DRAPER, J.* (concurring in dissent) — I concur in Chief Justice Utter's well reasoned dissent, and I would extend it further. The majority improperly relies on the outcome of the underlying case as the basis for its decision.

This appeal is from a trial court ruling that predates any determination on the merits of the disciplinary action against Justice Sanders. The majority correctly states that the issue here is whether the State is required to defend a judge who is *alleged* to have committed an ethics violation, but it goes on to analyze the question of whether Justice Sanders was acting in his official capacity based upon the *fact* that a violation was committed: "[T]he determinative question for purposes of his entitlement to representation by the attorney general is whether Justice Sanders' *ethical violations* were official acts." Majority at 7 (emphasis added). But when Justice Sanders brought suit in superior court to compel the attorney general to represent him before the Commission on Judicial Conduct (Commission), there had been no determination that he had committed an ethics violation. The majority decides this case after Justice Sanders was disciplined – with facts that did not exist when the trial court made the ruling from which he appeals. In my judgment, this is the fundamental error that leads to Chief Justice Utter's concern about the

* Judge David R. Draper is serving as justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

uncertainty of the law for future cases.

I agree with the majority that an official acts limitation on the attorney general's duty to defend flows logically from RCW 43.10.030 to .040. But I cannot agree with the majority's holding that RCW 43.10.040 never applies when a judge is charged with a violation of the Code of Judicial Conduct.[1] The majority appears to hold that it is impossible to violate the Code without stepping outside a judge's official capacity. If a memory lapse or arithmetic error results in exceeding the 90-day rule for announcing a decision, the majority would apparently conclude that the judge has stepped from official capacity to private life. Likewise, a judge who drowses on the bench would be acting entirely outside his or her official capacity. The holding is presented without analysis or citation to authority.

In deciding that Justice Sanders was not acting within his official capacity, the majority disregards the contrary rulings of the trial court,[2] the Commission,[3] and

[1] "Representation of a judge being disciplined for ethical violations is beyond the purpose of RCW 43.10.040." Majority at 7.

[2] The trial court found that "Justice Sanders was acting in his official capacity when he visited the special offender unit at McNeil Island." Clerk's Papers (CP) at 168. The State neither assigned error nor cross-appealed as to this finding.

[3] The Commission stated, "All of the misconduct took place in the Justice's official capacity." Suppl. CP at 236.

the Supreme Court.[4] The statement that those tribunals did not consider and find that Justice Sanders was acting in his official capacity is strained and unconvincing. The sum total of the majority's analysis is the unsupported conclusion that Justice Sanders' ethics violations were not official acts. This conclusion does not satisfy the need for careful analysis, even if one assumes the attorney general has discretion about whether to defend a judge. And, in effect, the majority's position allows the attorney general to initiate a misconduct complaint while exercising sole control over the accused judge's access to a defense.

Finally, and most significantly in my view, the grant of unqualified discretion to the attorney general is beyond the province of the courts. Even though RCW 43.10.030 and .040 were enacted long before the Commission was created, the majority presumes to declare that the legislative intent of the statutes is applicable in the context of Commission proceedings. The plain language of RCW 43.10.040 provides that the attorney general *shall* represent *all* state officials before *all* administrative tribunals of *any* nature. The majority interprets this language to mean that the attorney general has discretion to decline both representation and

[4] "Justice Sanders' actions were not simply undertaken as a private citizen, but rather within the context of his judicial duties." *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 523, 145 P.3d 1208 (2006).

reimbursement for defense costs, depending upon the outcome of disciplinary proceedings. Such a result may seem popular as an expression of disapproval for Justice Sanders' conduct, but it is an unacceptable exercise of judicial activism.

In my view, the majority goes far beyond the bounds of statutory construction and the examination of legislative intent. The only legislative history cited is to the effect that the legislature wanted to end the proliferation of attorneys hired by state agencies. That history does not speak to the defense of state officials who are sued individually and who should be protected from personal expense when they act in their official capacity. The proper approach is to allow the legislature to declare its own intent – either by amending the existing statute or by letting stand a decision in which the plain meaning of that statute is applied.

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WE CONCUR:
Robert F. Utter, Chief Justice Pro Tem.
Daniel J. Berschauer, Justice Pro Tem.
Frederick B. Hayes, Justice Pro Tem.